82-1705

Office Supreme Court, U.S.
FILED
APR 19 1983
ALEXANDER L. STEVAS
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NEW YORK UNIVERSITY MEDICAL CENTER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAWRENCE E. BLATNIK
Attorney

National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that an employer violates Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), if its hostility to certain employees' protected activities is shown, by a preponderance of the evidence, to be a motivating factor in its decision to discharge and suspend those employees, and the employer cannot establish by a preponderance of the evidence that it would have taken the same action for legitimate reasons, absent the employees' protected activities.

PARTIES TO THE PROCEEDINGS

Leigh Benin, Faustino Vargas, and Laszlo Berkovits were intervenors in the court of appeals and therefore are respondents in this Court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	2
Reasons for granting the petition	6
Conclusion	7
Appendix A	1a
Appendix B	27a
Appendix C	28a

TABLE OF AUTHORITIES

Cases:

Behring International, Inc. v *NLRB*, 675 F.2d 83, petition for cert. pending, No. 82-438 (filed Sept. 13, 1982) 6

Mt. Healthy City School District Board of Education v. *Doyle*, 429 U.S. 274 4

NLRB v. *Transportation Management Corp.*, 674 F.2d 130, cert. granted, No. 82-168 (Nov. 15, 1982) 6, 7

Wright Line, a Division of Wright Line, Inc., 251 N.L.R.B. 1083, enforced, 662 F.2d 899, cert. denied, 455 U.S. 989 ..... 4, 5, 6

Statute:

National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*:

Section 7, 29 U.S.C. 157 ..... 1, 5

Section 8(a), 29 U.S.C. 158(a) 2

Section 8(a)(1), 29 U.S.C. 158(a)(1) 2, 4, 5

Section 8(a)(3), 29 U.S.C. 158(a)(3) 4

Section 10(c), 29 U.S.C. 160(c) 2

In the Supreme Court of the United States

OCTOBER TERM, 1982

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NEW YORK UNIVERSITY MEDICAL CENTER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-26a) is not yet reported. The decision and order of the National Labor Relations Board (App. C, *infra*, 28a-31a) and the decision of the administrative law judge (App. C, *infra*, 32a-44a) are reported at 261 N.L.R.B. No. 118.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 27a) was entered on March 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities

for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title * * *.

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), provides in pertinent part:

> * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause * * *.

STATEMENT

1. Respondent New York University Medical Center provides health care services in New York, New York (App. C, *infra*, 33a). In September 1979, elections were held by the union at the Center to choose delegates to the national convention of the union's parent organization. A group of dissident union members, including employees Faustino Vargas and Leigh Benin, who also belonged to a political organization called the Committee Against Racism ("CAR"), ran for delegate positions against another slate of candidates which included the incumbent officers of the union (*id.* at 34a).

On September 21, 24 and 25, employee Benin and, on one occasion, employee Vargas distributed leaflets to employ-

ees encouraging them to support the dissident slate of candidates in the union election. One of the leaflets they distributed addressed issues of concern to employees, including loss of jobs, inflation and alleged racial segregation within the union. This leaflet also contained accusations that the respondent used its security guards as a "fascist gestapo" to conduct discriminatory searches of black and Hispanic workers (App. A, *infra*, 3a-4a; App. C, *infra*, 34a-35a). On September 28, respondent issued written disciplinary warnings to Benin and Vargas for their distribution of the leaflets. The warning letters stated that any repetition of such conduct would result in "appropriate disciplinary action, including suspension or discharge" (*id.* at 35a).

In early October, Benin, Vargas and employee Laszlo Berkovits took part in the preparation and distribution of another leaflet, which discussed the results of the recent balloting for convention delegates, stated that Benin and Vargas had received written warnings for their distribution of a previous leaflet, and renewed the allegation that "the N.Y.U. management is using the security guards for fascist gestapo tactics to intimidate black and Spanish workers" (App. C, *infra*, 35a). On October 5, Benin was notified by respondent that he was being suspended from work without pay because of his participation in the distribution of this leaflet (*id.* at 35a).

On October 8, Benin, Vargas and several other individuals picketed the home of respondent's assistant administrator to protest Benin's suspension (App. C, *infra*, 35a). Vargas and Benin did not go onto the assistant administrator's property at any time during the picketing (*ibid.*). On October 11, respondent discharged Benin and suspended Vargas. Respondent informed Benin and Vargas in writing that this disciplinary action was based in part on their participation in the picketing of the assistant administrator's home and that the employees' "recent activity in distributing leaflets * * * was also considered in reaching the decision" to discipline them (App. A, *infra*, 5a-6a). Respondent also issued a written warning to employee Berkovits on October 11 for his involvement in the distribution of the most

recent leaflet (App. C, *infra*, 36a). The Board's General Counsel subsequently filed a complaint alleging that respondent's disciplinary measures violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1).

2. The administrative law judge ("ALJ") found that respondent had violated Section 8(a)(1) of the Act by issuing disciplinary warnings to Benin, Vargas and Berkovits, by suspending Benin and Vargas, and by discharging Benin, because they engaged in the protected activity of distributing leaflets concerning an intra-union election campaign (App. C, *infra*, 32a-44a). The ALJ recommended that Benin be reinstated with back pay, that Benin and Vargas be reimbursed for wages lost during their periods of suspension, and that the disciplinary warnings issued to Benin, Vargas and Berkovits be expunged from respondent's personnel files (*id.* at 40a-44a).

In reaching his conclusion that the discharge of Benin and suspension of Vargas were unlawful, the ALJ expressly relied (App. C, *infra*, 38a-39a) on the Board's decision in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). In *Wright Line* the Board explained that, in determining whether an employer's action violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3),[1] it would first require the General Counsel to show that the employee's protected activities were a "motivating factor" in the employer's decision to take adverse action against the employee. If the General Counsel made this showing, the Board—following this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977)—ruled that the employer nevertheless could avoid an unfair labor practice finding if it proved, by a preponderance of the evidence, that it would have taken the adverse action even if the employee had not engaged in protected activities. 251 N.L.R.B. at 1089.

---

[1] The Board stated that the same test would apply to "violations of Section 8(a)(1) turning on employer motivation." 251 N.L.R.B. at 1089.

Here, after reviewing the evidence presented by both sides, the ALJ found that the General Counsel had sustained his burden of establishing that the employees' protected leafleting activity was a motivating factor in the discharge of Benin and the suspension of Vargas (App. C, *infra*, 38a). The ALJ further found that respondent had failed to rebut the General Counsel's showing by establishing that it would have discharged Benin and suspended Vargas if they had engaged only in picketing activity (*id.* at 39a). The ALJ relied on the fact that dual reasons were stated in the disciplinary papers given to the employees, and on respondent's testimony that it used a progressive disciplinary system under which the picketing alone would not have justified the sanctions of discharge and suspension (*id.* at 38a-39a). The ALJ found it unnecessary to reach the issue of whether the employees' picketing activity was protected under the Act (*id.* at 38a).

The Board affirmed the decision of the ALJ and adopted his recommended order (App. C, *infra*, 28a-31a).

3. The court of appeals sustained the Board's findings that the employees' leafleting activity was protected by Section 7 of the Act, 29 U.S.C. 157, and that respondent's suspension of Benin and issuance of warning letters to Benin, Vargas and Berkovits for the distribution of the leaflets violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1) (App. A, *infra*, 1a-26a). However, the court remanded the case to the Board for reconsideration of the conclusion that respondent's discharge of Benin and suspension of Vargas violated Section 8(a)(1) of the Act. The court disagreed with the Board's *Wright Line* allocation of the burden of proof, holding that, while a burden of production may properly be placed on the employer once the General Counsel has shown the employer's unlawful motivation, shifting the burden of persuasion to the employer is inconsistent with the Act (App. A, *infra*, 13a-26a). Since the court was "not persuaded that, had the Board imposed a burden of production as opposed to a burden of persuasion on the employer, it would have arrived at the same result" with respect to the discharge of Benin and suspension of

Vargas (*id.* at 25a), it concluded that a remand was necessary.

REASONS FOR GRANTING THE PETITION

On November 15, 1982, this Court granted the Board's petition for certiorari in *NLRB* v. *Transportation Management Corp.*, No. 82-168, a case in which the Board seeks review of a First Circuit decision rejecting the burden-shifting aspect of the Board's *Wright Line* test.[2] Oral argument was heard in *Transportation Management* on March 28, 1983.

Here, the Second Circuit has likewise rejected the burden-shifting aspect of the Board's *Wright Line* test,[3] in concluding that only the burden of production, not the burden of persuasion, could shift to respondent after the General Counsel establishes that an employee's protected activity was a motivating factor in the employer's decision to take adverse action. As the remand makes clear, the court considered the allocation of burdens of proof to be material. Thus, this case presents the same issue that will be resolved by the Court in *Transportation Management.*

---

[2] A copy of our petition in *Transportation Management* has been sent to respondents.

[3] In its decision, the Second Circuit expressly relied on First Circuit decisions, as well as those of the Third and Seventh Circuits (App. A, *infra*, 15a-17a, 25a n.15). The First Circuit initially expressed its disapproval of the Board's *Wright Line* test in the proceedings to review the *Wright Line* order. 662 F.2d at 904-907. (Because the First Circuit believed that the shifting of the burden of proof was not material to the outcome of *Wright Line* itself, it enforced the Board's order in that case (*id.* at 907-909).). The First Circuit in *NLRB* v. *Transportation Management Corp.*, 674 F.2d 130, 131 (1982), cert. granted, No. 82-168 (Nov. 15, 1982), and the Third Circuit in *Behring International, Inc.* v. *NLRB*, 675 F.2d 83, 89 (1982), petition for cert. pending, No. 82-438 (filed Sept. 13, 1982), have relied on the First Circuit's discussion in the *Wright Line* case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of the Court's decision in *NLRB* v. *Transportation Management Corp.*, No 82-168.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAWRENCE E. BLATNIK
Attorney
National Labor Relations Board

APRIL 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 450—AUGUST TERM, 1982
(Argued November 4, 1982 Decided January 21, 1983)
Docket No. 82-4137

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

—AND—

LEIGH BENIN, FAUSTINO VARGAS, AND
LASZLO BERKOVITS, INTERVENORS,

v.

NEW YORK UNIVERSITY MEDICAL CENTER, RESPONDENT.

Before:

TIMBERS, KEARSE, AND PIERCE, *Circuit Judges.*

TIMBERS, *Circuit Judge:*

This case brings sharply into focus the propriety of the *Wright Line*[1] test of the National Labor Relations Board (Board) for evaluating mixed motive discharges. The Board applies, pursuant to § 10(e) of the National Labor Relations Act, 29 U.S.C. §§ 151, 160(e) (1976) (Act), for enforcement of its order, 261 N.L.R.B. No. 118 (1982), issued against New York University Medical Center (Center). The Board found that the Center had violated § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1) (1976), by disciplining three employees for engaging in protected leafleting activity. The Center initiated disciplinary proceedings in the wake of the first con-

---

[1] *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980).

tested leafleting incident, took further action after subsequent leafleting, and took final action after two employees had engaged in picketing to protest the prior disciplinary actions.

Applying its *Wright Line* test, the Board found that the General Counsel had made out a prima facie case of unlawful motivation and that the Center had not sustained its consequent burden of proving that it disciplined the employees for a legitimate reason, namely, the alleged unprotected picketing. The Board, therefore, did not have to reach the question whether the picketing was protected activity under the Act. Accordingly, it ordered that one discharged employee, Leigh Benin, be reinstated with backpay and that disciplinary measures taken against two other Center employees, Laszlo Berkovits and Faustino Vargas, be rescinded.

Since we hold that the leafleting was protected activity under the Act, we are prepared to enforce so much of the Board order that countermands the disciplinary measures taken in direct response to the leafleting. Since we hold, however, that the Board's *Wright Line* test is not the appropriate legal standard for assessing the final disciplinary action taken after the picketing, we remand for further proceedings and we retain jurisdiction pending the Board's further order.

I.

During September 1979 elections were scheduled by District 1199, National Union of Hospital and Health Care Employees (Union) at the Center to choose delegates to the national convention of the Union's parent organization. Balloting for employees in the Center's Guild Division was scheduled for September 18 and in the Hospital Division one week later. The three employees in question—Vargas, Benin, and Berkovits (all technicians)—were dissident members of the Union who belonged to a splinter national political organization called the Committee Against Racism (CAR). The CAR faction of the Union, along with employees aligned with members of the Progressive Labor Party, decided to present a slate of its own candidates in opposition to a delegate slate comprised mainly of incumbents.

The dissident slate received sixty percent of the vote in the first round on September 18. To continue the momentum generated by the election results, those supporting the CAR slate initiated an aggressive leafleting drive, a tactic it had used intermittently in the past, to garner support from the Center's employees. CAR supporters passed out several leaflets to the employee electorate asking for its votes. One leaflet incurred the Center's wrath because of the way it depicted recent searches of Black and Hispanic employees by the Center's security guards:

> "The bosses are making it harder for us everyday! Every pay check buys less food and other necessities! 26 hospitals have closed, costing thousands of jobs. At NYU harassment (for calling in sick, etc.) and arbitrary firings have increased tenfold. And the NYU bosses have turned their security guards into a fascist gestapo illegally searching workers and firing them.
>
> "The bosses inflation, hospital closings, layoffs, harassment, and firings have hit lower paid, mainly black and latin workers hardest. At the same time the bosses are building up Klan and Nazi "white power" punks to further divide us. All of this builds fascism, which will put all workers in chains. We must fight racism to unite workers against the bosses growing fascism.
>
> "In all of this, the leadership of 1199 from Davis down to Punk dis-organizer Roger Hayes have allowed the bosses to walk all over us. By refusing to fight and blocking those of us who are willing to fight the bosses, Davis and Co. are helping the bosses to build fascism.
>
> "Moreover, while CAR has been organizing workers, on a multi-racial basis, to beat up the segregationist Klan all over the country, Davis has built segregation into 1199 by setting up Divisions that separate nurses aides, building service, kitchen, central service, etc—(Hosp. Div.) who are almot 100% black and latin, from technicians, social workers, etc.—(Guild) half of whom are white. The lower paid Hospital Div. workers are discriminated against by the 1199 contract. They work 37½ hours and get 2 weeks vacation, while 2/3 of the Guild work 35 hours and get 4 weeks vacation. 1199's percentage raises also give less to low-

er paid workers. We are organizing a campaign to abolish these racist divisions in order to unite 1199ers.

"On Tuesday, Sept. 18th NYU Guild Div. 1199ers voted for the CAR-PLP slate (#2) by a 60% majority! WE URGE HOSPITAL DIVISION MEMBERS TO VOTE SLATE 2 AT THE 1199 MEETING on Tuesday, Sept. 25th at 7:30AM, 2:PM, 4:PM in I.R.M. Room 610A (take the elevator in IRM to the sixth floor and walk like you are going to first ave.)

"Turn 1199 into an anti-fascist union led by the anti-racist rank and file."

In response, the Center sent warning letters to Benin and Vargas advising them that their participation in the leafleting warranted discipline and that resumption of similar activity would be ground for suspension or discharge. The two employees countered by filing a grievance on October 2, asserting that the Center had no cause to issue the warning letters.

These two employees, along with Berkovits, subsequently assisted in preparing and/or distributing another leaflet. The leaflet reported the election results, disclosed that Benin and Vargas had received warning letters, and repeated the accusation concerning the searches by the Center's security guards:

"In the past two weeks three important things have happened at N.Y.U. On Sept. 18 Committee Against Racism's (CAR) Slate 2 won the election in the Guild Division (the election for delegates to the 1199 constitutional Convention). On Sept. 25 the union misleadership organizer, Roger Hayes, stuffed the ballot box in the Hospital Division election with 44 extra votes. On Sept. 28 the N.Y.U. management gave correction notices to the two main leaders at N.Y.U. of the International Committee Against Racism Leigh Benin and Sam Vargas, Slate 2 candidates. . . .

"Why is the N.Y.U. management trying to harrass us? It is to try to intimidate N.Y.U. workers and fire Sam Vargas, Committee Against Racism member, and Leigh Benin, CAR and PLP member. It is because N.Y.U. workers led by CAR have shown that we can take the bosses head on: we fought and won against some racist firings and we are making headway in

turning 1199 into a militant, anti-racist union by destroying all the racist divisions in the union to unite us into a powerful multi-racial union.

"We reaffirm our charge that the N.Y.U. management is using the security guards for fascist gestapo tactics to intimidate black and Spanish workers. (Some security guards are opposed to this.) For example, Thurs, Sept 27, a Spanish kitchen worker was taken from the door beside the Emergency Room exit and taken to the Security guard's office and searched thoroughly. They found nothing!

* * *

"If the N.Y.U. management feels threatened, it has reason to because we mean business.!"

On October 5, the Center suspended Benin because of the leaflet activity.

In protest, Benin and Vargas, along with other individuals associated with CAR,[2] picketed in front of the home of the Center's assistant administrator, Safian, on October 8. Apparently the employees believed that Safian had played a significant role in meting out the discipline. Benin carried a sign stating that Safian was guilty of unfair labor practices. Vargas' sign announced an upcoming CAR rally. Although Vargas and Benin never intruded upon the administrator's property, at least one of the other picketers did, leaving two signs on the mailbox. One read, "Safian, You Fascist We'll Burn You into Ashes". The other read, "Safian Uses Fascist Tactics Against Workers."

The Center discharged Benin on October 11. The telegram notifying him of his dismissal stated:

"You are hereby terminated from your employment at New York University Medical Center for threatening a Medical Center Administrator and his family and engaging in intimidating behavior outside his house on October 8, 1979.

"Your recent activity in distributing leaflets containing inflammatory and baseless charges which incited employees and disparaged the good name and reputation of the Medical Center was also considered in reaching the decision to discharge you."

---

[2] The group consisted of eleven adults and four children.

The Center also suspended Vargas for similar reasons. It issued a warning letter to Berkovits for his involvement in distributing the most recent leaflet. The Center's Discipline and Grievance Administration Policy outlined a progressive discipline approach. The first step consisted of a warning, the next a suspension, and finally, discharge. The policy, however, specifically allowed for earlier discharge if the situation so warranted. Vargas and Benin filed grievances.

The grievances of Benin and Vargas were referred to arbitration in accordance with the collective bargaining agreement. Vargas withdrew from the arbitration on March 13, 1980, after two days of hearings. The arbitrator, in a decision dated May 20, 1980, ruled that the warning letter issued to Benin, his supension, and his discharge were for just cause. Specifically, the arbitrator ruled that the contents of the leaflets were inflammatory, irresponsible, and hence unprotected under the Act.

The General Counsel of the NLRB filed a complaint alleging that the Center's disciplinary measures violated § 8(a)(1) of the Act. After a hearing, the ALJ, with the Board's subsequent sanction, determined that the Center had violated § 8(a)(1) by issuing the written warnings to all three employees, suspending two of the employees, and discharging one for engaging in the protected leafleting activity. The Board did not determine whether the picketing was protected since it found that the leafleting was a "motivating factor" in all of the disciplinary stages, and that the Center had not proven that it would have pursued the same course of action were only the picketing involved. The Board's remedial order directed the Center to cease and desist from committing the unfair labor practices, to reinstate Benin with backpay, to compensate Vargas and Benin for losses sustained as a result of the suspensions, and to rescind the warning letters.

II

We must initially determine whether the Board's decision not to defer to the arbitrator's award was proper. In *Liquor Salesmen's Union Local 2* v. *NLRB*, 664 F.2d 318, 326 n.3 (2 Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct.

2236 (1982), we recently reiterated that an "abuse of discretion" standard is appropriate to review Board decisions enforcing or overturning arbitration awards. *See also* NLRB v. *Horn & Hardart Co.*, 439 F.2d 674, 678-79 (2 Cir. 1971). Although the Board defers as a matter of discretion to arbitrators' decisions issued pursuant to collective bargaining agreements,[3] *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1965), it will defer only if (1) the proceedings appear to have been fair and regular; (2) the parties agree to be bound by the arbitration;[4] and (3) the decision is not clearly repugnant to the purposes and policies of the Act. *Id.* at 1082.[5] Applied to the facts of this case, the Board claims that the arbitrator's award was contrary to the policies of the Act.

The Board defends its decision not to defer on the ground that the leaflets clearly deserved protection under the Act. The Board is certainly correct that the arbitrator did not consider the *rhetorical* nature of the language used in the leaflets and, as we shall discuss in Part III, *infra*, the leaflets do merit protection under the Act. While the arbitrator's opinion cannot be said to ignore the pertinent law or to misread the record, we hold that the Board's conclusion that it was repugnant to the Act is not an abuse of discretion. *See NLRB* v. *Owners Maintenance Corp.*, 581 F.2d 44, 48 (2 Cir. 1978) ("the Board may reject 'an arbitral award which condoned an unfair labor practice as repugnant to the purposes and policies of the act'"). Thus, the propriety of the Board's § 8(a)(1) determination with re-

---

[3] The Board's discretionary policy stems from the national labor goal of encouraging private resolution of disputes. *See, e.g., United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

[4] Only Benin could be bound by the arbitrator's decision since Berkovits never submitted his grievance to arbitration and Vargas withdrew his grievance before the hearing had concluded. *See, e.g., Kansas City Star Co.*, 236 N.L.R.B. 866, 867 n.1 (1978).

[5] The Board's *Spielberg* doctrine received apparent sanction in *Carey* v. *Westinghouse Elec. Corp.*, 375 U.S. 261, 270-72 (1964).

spect to the discipline of the three employees is squarely before us.

III.

Employees' leafleting generally constitutes concerted activity for the purpose of "mutual aid and protection" within the meaning of § 7 of the Act, 29 U.S.C. § 157 (1976). Dissemination of information lies at the core of the protections afforded statutory employees, *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325 (1974), and leafleting may be one of the most effective means of attaining that end. The Center does not dispute that its employees had the right to leaflet, or that the leaflets actually distributed were directed to other employees. Rather, it asserts that the contents of the leaflets in question strip the activity of the Act's protection. It argues first that the leaflets contained provocative language which was disruptive of discipline; second, that the leaflets contained falsehoods published in reckless disregard of the truth; and third, that they manifested disloyalty to the employer and hence lost all protection under the Act.

The Center's characterization of the leaflets as provocative is certainly apt. The leaflets likened the Center to the "gestapo," and accused it of implementing fascist tactics. Because of the provocative language used, the Center argues that the leaflets should not be protected under the Act. It premises its argument on *Southwestern Bell Telephone Co.*, 200 N.L.R.B. 667 (1972), in which the Board held that an employer lawfully forbade employees from wearing sweatshirts with the provocative slogan, "Ma Bell is a Cheap Mother." In a similar case, the Sixth Circuit disagreed with the Board and upheld an employer's decision to forbid its employees from publicizing a grievance by wearing a shirt lettered, "I'm tired of bustin' my ass." *Borman's Inc.* v. *NLRB*, 676 F.2d 1138 (6 Cir. 1982) (decided on ground that wearing of T-shirt did not constitute exercise of § 7 right); *see also Boaz Spinning Co.* v. *NLRB*, 395 F.2d 512 (5 Cir. 1968) (denying enforcement of Board order reinstating an employee who accused the plant manager in presence of other employees at a meeting of being "no dif-

ferent than Castro"). The Center argues that epithets of "fascist" and "gestapo" are even more objectionable than the slogans found unprotected in *Southwestern Bell* and *Borman's*.

Yet the critical question is not merely whether the leaflets are provocative, but whether the provocation could be expected to threaten plant discipline. For instance, in *Southwestern Bell*, the Board upheld the employer's discipline not because of the language itself but because the slogan could reasonably be perceived as a threat to plant discipline: "Respondent 'was under no compulsion to wait until resentment piled up and the storm broke before it could suppress the threat of disruption by exercising its right to enforce employee discipline.'" 200 N.L.R.B. at 671 (citation omitted). Our Court in *NLRB* v. *Owners Maintenance Corp.*, *supra*, also emphasized that an employee's objectionable language must be analyzed for its likely impact on the workplace. *See id.* at 50. Opprobrious language during the course of otherwise protected activity remains "likewise protected unless found to be 'so violent or of such serious character as to render the employee unfit for further service.'" *Dreis & Krump Manufacturing Co.* v. *NLRB*, 544 F.2d 320, 329 (7 Cir. 1976).[6] Thus, we must determine if the language in the leaflets was likely to produce misconduct or generally disrupt discipline.

We do not believe that the words by themselves were so offensive as to jeopardize plant discipline. As the Supreme Court remarked in the context of a defamation action, federal law gives a union the "license to use intemperate, abusive or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." *National Association of Letter Carriers* v. *Austin*, 418 U.S. 264, 283 (1974). Indeed, use of the epithet "fascist" was held protected in *Cafeteria Employees Union, Local 302* v. *Angelos*, 320 U.S. 293, 295 (1943), as was

[6] Most of the cases in which the objectionable language has been found unprotected have been marked by obscenities, *see, e.g., Sullair P.T.O., Inc.* v. *NLRB*, 41 F.2d 500, 502-03 (7 Cir. 1981); or sexual innuendo, *see Southwestern Bell*, *supra*. There is no contention that the leaflets here contained such language.

the charge of "racist" in *NLRB* v. *Owners Maintenance Corp.*, supra, at 47 n.7. 49-50. Although accusations of "gestapo-like tactic" should not be taken lightly, the Center has not produced any evidence that it had a reasonable expectation that misconduct would ensue.

The Center insists that the leaflets advocate violence. From its perspective the first leaflet's call for "beat[ing] up the segregation Klan", juxtaposed with the attack upon the "bosses [for] building up Klan and Nazi 'white power' punks", threatened violence, as did the second leaflet's conclusion, "If the N.Y.U. management feels threatened, it has reason to be because we mean business." Fairly viewed, we believe that the leaflets taken as a whole simply did not exhort the employees to violence. The reference to beating up the Klan does not suggest that the administration would be an appropriate target for retributive rage, and the statement "we mean business" in context seemingly refers to the prior discussion of the need for defending employee rights vigorously. Indeed, the leaflets employ rhetoric unexceptional for a splinter political group. Testimony was presented at the hearing that the group had passed out similar leaflets earlier with no adverse administrative reaction.

Moreover, the Center's argument takes the leaflets completely out of context. The principal aim of the first leaflet was not to provoke other employees against management, but to curry favor among potential voters for the dissident slate. The CAR faction wished to appear as militant as possible, hoping eventually to wrest leadership of the Union from the incumbents. The leaflet did identify issues pertinent to employees' working conditions—inflation and the alleged searches of minority workers. The second leaflet similarly sought to garner support for the dissident faction. It protested the Center's decision to mete out discipline in the wake of the first leaflet, and reasserted the charge that the Center's security guards had carried out illegal searches. Challenges to the incumbent union's performance as collective bargaining representative fall within the ambit of § 7 protected activities. *See Eastex, Inc.* v. *NLRB*, 437

U.S. 556, 574 & n.23 (1978); *NLRB* v. *Transcon Lines*, 599 F.2d 719, 721 (5 Cir. 1979).

Both leaflets, therefore, primarily attempted to rally employees to the dissident side and not to incite employees against the Center. There had been no history of violence at the Center and no showing of incipient labor-management strife. The leaflets did not pose a continual challenge to the administration's authority in the same sense as did the slogan "Ma Bell is a Cheap Mother" emblazoned across the employees' sweatshirts in *Southwestern Bell*. Nor was there the same potential for friction as with shirts advertising "I'm tired of bustin' my ass" in *Borman's*. Unlike the situations in these two cases, the alleged incendiary language in the leaflets in the instant case was directed at fellow employees and the presence of the leaflets did not serve as a constant irritant in the same way as the clothes worn in *Borman's* and *Southwestern Bell*. The leafleting was an essential means to enable the dissident faction to communicate with the rest of the rank-and-file. We hold that substantial evidence supports the Board's determination that the objectionable language in the leaflets posed no danger of breach of employee discipline.

The Center also argues that, irrespective of the terms used in the leaflets, assertions that the Center's security personnel illegally searched employees are tantamount to charges of criminal assault and battery, and hence should be unprotected. We are not persuaded that the leaflets contained such defamatory attacks.

In *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), the Supreme Court set forth the pertinent standard for assessing defamatory statements in the labor-management relations context. Erroneous assertions lose their protected status only when they are published with "knowledge of their falsity or with reckless disregard of whether they were true or false." *Id.* at 65 (basing standard on *New York Times Co.* v. *Sullivan*, 373 U.S. 254 (1964)). Although *Linn* involved a civil libel suit, we previously have applied its standard in the broader context of employee protected activity under § 7 of the Act, *see Montefiore Hospital & Medical Center* v. *NLRB*, 621 F.2d

510, 516-17 (2 Cir. 1980), and we hold it to be controlling in this case. *See also Linn, supra*, 383 U.S. at 61 (acknowledging that Board utilized standard in § 7 context).

Applying the *Linn* standard, we hold that the assertions concerning searches of minority employees by the Center's security guards were not levelled in reckless disregard of the truth. The Center does not dispute that the searches took place. Benin, Vargas, and Berkovits testified at the hearing that they had received reports of the searches from other employees, including some of the employees allegedly searched. In addition, they identified several of the employees who had furnished the information. The Center never produced any witnesses to rebut the employees' testimony. While Center personnel testified that searches were carried out pursuant to established Center regulations and that they were not discriminatory, their testimony did not demonstrate that the leaflets showed utter indifference to the truth. To be sure, the employees should have investigated further before disseminating rumors of the searches, and their failure to institute grievance proceedings or even approach the administration concerning the searches cast doubt upon their good faith. Yet there is no evidence that they distorted the reports they received from fellow employees. No material, deliberate misstatements were made.[7] The charges merely manifested the rhetoric characteristic of other parts of the leaflets. As the Supreme Court has stated:

> "Labor disputes are ordinarily heated affairs . . . characterized by bitter and extreme charges, counter-

---

[7] The Center points to two particular statements in the leaflets which it claims were deliberately false—the assertion in the first leaflet that guards were "firing" workers and the assertion in the second leaflet that a "Spanish kitchen worker was taken from the door beside the Emergency Room exit and taken to the security guard's office and searched thoroughly." The Center's argument, however, is not persuasive. Although security personnel do not have the actual authority to discharge employees, their reports, based on the results from searches, can produce the same result. The leaflet seems to imply that correlation. Similarly, the kitchen worker may never have told Vargas that he was searched "thoroughly", but that description, even if exaggerated, hardly qualifies as a deliberate misstatement.

> charges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language."

Linn, supra, 382 U.S. at 58. Therefore, we hold that the Board's determination that the leaflets were not defamatory is supported by substantial evidence, and consequently the assertions of searches do not remove the leaflets from the Act's protection under § 7.

Finally, we are not persuaded by the Center's attempts to characterize the leafleting as "disloyal" under the Supreme Court's decision in *NLRB* v. *Local Union No. 1229, I.B.E.W. (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953). To be disloyal, employees' conduct must publicly disparage the employer's product. *See id.* at 471-72; *Misericordia Hospital Medical Center* v. *NLRB*, 623 F.2d 808, 813-15 (2 Cir. 1980). The leaflets, directed at fellow employees, related to up-coming union elections. They made no comment about the quality of the Center's medical services. Thus, they did not constitute disparagement of the employer's product.

We therefore hold that the leafleting warrants protection under the Act. Any discipline that stemmed directly from this concerted protected activity violated § 8(a)(1) of the act. Since the leafleting was the acknowledged predicate for the warning letters and initial suspension of Benin, we are prepared to enforce that part of the Board order requiring the Center to rescind the warning letters and to compensate Benin for the suspension.

IV.

For us to enforce the Board's order in full, we must be satisfied that the Center decided upon its final disciplinary steps—discharging Benin and suspending Vargas—because of the employees' participation in the protected leafleting activity. Under the Board's *Wright Line* test for assessing mixed motive discipline decisions, the General Counsel's presentation of a prima facie case of unlawful motivation shifts the burden of persuasion to the employer to demonstrate that an independent, lawful motive controlled its de-

cision. The Board contends that the leafleting was the "motivating factor" in the Center's decision to fire Benin and suspend Vargas and that the disciplinary measures thus violated § 8(a)(1) of the Act. It asserts that the Center did not sustain its burden of persuasion to rebut the General Counsel's proof. The Center counters that it did show an independent, lawful motive for the discipline—namely, the picketing—but that the Board's test imposed too high a standard of proof. We agree that shifting the burden of persuasion to the employer frustrates the balance between employer and employee rights struck in the Act.

A consensus among the courts of appeals has been reached with regard to the causation inquiry established in the Board's *Wright Line* test. The General Counsel must prove that the unlawful motive was the "but for" cause of the disciplinary measures. *E.g.*, *NLRB* v. *Fixtures Mfg. Corp.*, 669 F.2d 547, 550 (8 Cir. 1982); *NLRB* v. *Batchelder Co.*, 646 F.2d 33, 39 & n.12 (2 Cir. 1981); *NLRB* v. *Mount Desert Island Hospital*, ___ F.2d ___ (1 Cir. 1982) (No. 82-1313), slip op. at 9-10 (Dec. 14, 1982); *NLRB* v. *Wright Line, A Division of Wright Line, Inc.*, 662 F.2d 899, 902-03 (1 Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1612 (1982). In addition, the reviewing courts have agreed that, after the General Counsel has presented a prima facie case, some type of burden should be imposed on the employer. To rebut the showing of unlawful motivation, it must introduce evidence of independent motivation for its decision. Since the employer presumably has greater access to information regarding its own motivations, shifting the burden to a certain degree after the General Counsel's showing of unlawful motivation is justified. However, the extent of that burden remains in dispute.

Although shifting the burden of persuasion has been sanctioned by four circuits, *Zurn Industries, Inc.* v. *NLRB*, 680 F.2d 683, 687 (9 Cir.1982); *NLRB* v. *Fixtures Mfg. Corp.*, *supra*, 669 F.2d at 550 & n.4; *Red Ball Motor Freight, Inc.* v. *NLRB*, 660 F.2d 626, 627-28 (5 Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S. Ct. 2282 (1982); *NLRB* v. *Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 446 (6 Cir. 1981), three circuits have held that such a shift violates the

requirements imposed upon the Board in § 10(c) of the Act, 29 U.S.C. § 160(c) (1976), that the General Counsel prove each unfair labor practice by a preponderance of the evidence. *NLRB* v. *Webb Ford, Inc.*, 689 F.2d 733, 739 (7 Cir. 1982); *Behring International, Inc.* v. *NLRB*, 675 F.2d 83, 87-91 (3 Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3199 (U.S. September 13, 1982) (No. 82-438); *NLRB* v. *Wright Line, A Division of Wright Line, Inc.*, *supra*, 662 F.2d at 902-05. *See also NLRB* v. *Transportation Management Corp.*, 674 F.2d 130 (1 Cir. 1982), *cert. granted*, 51 U.S.L.W. 3373 (U.S. Nov. 16, 1982) (No. 82-168). Accordingly, the latter courts have held that the General Counsel's prima facie case shifts the burden of production, but not the burden of persuasion, to the employer to present some evidence that the discharge would have been effected irrespective of the discriminatory motive. We turn first to an examination of the propriety of the Board's burden shifting test.

At the outset of our analysis, we note that deciding the proper allocation of burdens is not within the Board's special competence "of applying the general provisions of the Act to the complexities of industrial life ... and of '[appraising] carefully the interests of both sides of any labor-management controversy in the diverse circumstances of the particular cases.'" *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 496 (1979) (citations omitted). Rather, the issue presented is a matter of statutory interpretation deserving greater scrutiny: "questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose specific duty it is to administer the questioned statute." *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944); *see also NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 289 (1974); *NLRB* v. *Highland Park Manufacturing Co.*, 341 U.S. 322, 325-26 (1951). Especially when the contested interpretation implicates an explicit provision in the governing statute, we accord limited deference but with an eye fixed to the text and legislative purpose of § 10(c) of the Act.

We commence our scrutiny with an examination of the relevant part of § 10(c), which three courts of appeals have interpreted to require modifying the Board's allocation of burdens in discriminatory discharge cases:

> "If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board should state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . if such individual was suspended or discharged for cause."

The question, then, is whether the Board's test shifting the burden of persuasion to the employer violates that statutory mandate.

We believe, in accord with the First, Third, and Seventh circuits, that § 10(c) does not permit shifting the burden of persuasion. The plain language of the statute indicates that the General Counsel must prove by a preponderance of the evidence that the employer violated the Act. Indeed, the Board's own regulations specify that the "Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act." 29 C.F.R. § 101.10(b) (1982).[8] In the face of § 10(c)'s seemingly clear directive, the Board, backed by several circuit courts, argues that shifting the burden does not affect the ultimate burden of proof. For further support, it relies on the legislative history behind enactment of § 10(c). We are persuaded by neither justification.

The Board's insistence that implementation of its test does not affect the ultimate burden of persuasion is simply unsupportable. Placing the burden of persuasion upon the employer to prove by a preponderance of the evidence that it had a lawful motive for the discharge does shift the ultimate burden. As Dean McCormick has explained, "the bur-

---

[8] In addition, § 7(c) of the Administrative Procedure Act 5 U.S.C. § 556(d) (1976), states that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

den of persuasion is assigned only once—when it is time for a decision." McCormick, McCormick's Handbook of the Law of Evidence § 337, at 788 (2d ed. 1972). In other words, the ultimate burden of persuasion rests with the party that must convince the trier of fact at the end of a trial as to the outcome determinative issue—in this instance, the "real" motivation for the discipline. *See 9* Wigmore, Evidence § 2485, at 283-87; § 2489, at 300-01 (Chadbourn rev. ed. 1981). Under the Board's *Wright Line* test, the General Counsel has to demonstrate only that the unlawful motive was a "motivating factor" in the discipline, not that the unlawful reason was the "but for" cause. If the unlawful "motivating factor" element is shown and the employer then fails to prove by a preponderance of the evidence that its independent lawful motive was the "but for" cause, then the Board would find that the employer violated the Act. As the Third Circuit stated in *Behring*, "[t]his would be so despite the fact that two factors—neither outweighing the other—had been advanced as causes, and the Board never determined which was the *real* one." 675 F.2d at 88 (emphasis added). Thus, the clear effect of the Board's rule is to change the ultimate burden of persuasion.[9] Pursuant to *Wright Line*, any case resting

[9] The Board characterizes its burden shifting approach as imposition of an affirmative defense. *Wright Line*, *supra*, 251 N.L.R.B. at 1088 n.11. To begin with, there is no question that an affirmative defense at least shifts the burden of persuasion on the particular issue—in this case whether the employer had a legitimate reason for reaching the decision to discipline the employees. An affirmative defense is usually reserved for those situations in which a defendant must prove a fact which bears no necessary relationship to an element of the charged offense. *See Mullaney* v. *Wilbur*, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring) (discussing permissible affirmative defenses in criminal context). For example, "necessity" or "self defense" is a common affirmative defense to a criminal charge. The defendant in those situations does not dispute the factual predicate to the charge; rather, he pleads extenuating circumstances to prove justification. But the burden shifts in this case on the issue of "causation" which lies at the heart of the § 8(a)(1) charge—was the unlawful motive a "but for" cause of the decision to discipline? Thus, it is quite unpersuasive to claim that the burden is shifted on only the one issue and that the ultimate burden rests with the Board—there is no other issue in the case. *Cf.*

in equipoise would result in finding the employer guilty of an unfair labor practice, a result plainly at odds with the statute.[10]

An examination of the legislative history indicates that our reading of § 10(c) is at least consistent with, if not dictated by, the extant legislative materials. In general, through § 10(c) and related provisions,[11] Congress sought to limit discretion exercised by the Board under the Wagner Act. *See, e.g.*, H.R. Rep. No. 245, 80th Cong., 1st Sess. 40-43, *reprinted in* 1 NLRB Legislative History of the Labor-Management Relations Act of 1947 (Legislative History) at 292, 331-34 (1948). In the discriminatory discharge context, the original House bill placed the burden

---

Stump v. *Bennett*, 398 F.2d 111 (8 Cir.) (shifting the burden of persuasion to defendant to prove an alibi is unconstitutional since the alibi is a direct denial of participation in the criminal act, not a justification for admitted conduct), *cert. denied*, 393 U.S. 1001 (1968).

[10] We recognize that a recent opinion of this Court indicated approval of the Board's *Wright Line* test, including the burden shifting formulation. *Consolidated Edison Co.* v. *Donovan*, 673 F.2d 61, 62-63 (2 Cir. 1982). We applied the Board's test in the analogous context of the Energy Reorganization Act. However, the allocation of burdens evidently played no outcome determinative role in that case since the finding of discriminatory discharge would have been upheld under either variant of the "but for" test. *Id.* at 63-64. While shifting the burden of persuasion may be appropriate in Energy Act cases, the Energy Act has no counterpart to § 10(c) of the NLRA requiring proof by a preponderance of the evidence. *See* 42 U.S.C. § 5851 (Supp. III 1979). Thus, reliance on *Consolidated Edison* for establishing a precedent in this circuit is misplaced. *See also NLRB* v. *American Geri-Care, Inc.*, ___ F.2d ___ (2 Cir. 1982) (No. 82-4053), slip op. 837, at 851-54 & n.15 (Dec. 23, 1982).

[11] Congress amended § 10(e) to provide that Board orders are conclusive only if supported by "substantial evidence in the record as a whole." The fear was that the prior standard, "if supported by evidence" was in effect an abdication of appellate review. See H. Conf. Rep. No. 510, *supra*, at 55-56, *reprinted in* 1 Legislative History at 505, 559-60 ("[c]ourts will be under a duty to see that the Board ... does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding and discrediting the evidence that is in conflict with its findings.").

squarely upon the General Counsel to prove that an employee was not discharged for cause: "no order of the Board shall require the reinstatement of any individual as an employee, or the payment to him of any back pay, unless the weight of the evidence shows that such individual was not suspended or discharged for cause." H.R. 3020, 80th Cong., 1st Sess. 39 (1947), *reprinted in* 1 Legislative History, at 31, 69. Members of the House apparently wished to prod the Board to articulate its reasons for reinstating an employee and thus ensure that meaningful appellate review would be possible. In too many cases, the Board had presented its conclusion of discriminatory discharge without analyzing why the illegitimate motive was the *real* reason for the discipline. *See* H.R. Rep. No. 245, *supra*, at 42, *reprinted in* 1 Legislative History, at 292, 333. The Senate amendments to the bill, however, omitted the "cause" provision. S. 1126, 80th Cong., 1st Sess. 28 (1947), *reprinted in* 1 Legislative History, at 99, 126. In reaching a compromise, the conference committee deleted the "weight of the evidence" language but inserted the cause provision, reformulating the standard in positive as opposed to negative terms. The committee report explained that:

> "The House bill also included, in section 10(c) of the amended act, a provision forbidding the Board to order reinstatement or back pay for any employee who had been suspended or discharged, unless the weight of evidence showed that the employee was not suspended or discharged for cause. The Senate amendment contained no corresponding provision. The conference agreement omits the 'weight of evidence' language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause (see *Wyman-Gordon* v. *N.L.R.B.*, 153 Fed. (2) 480), will not be entitled to reinstatement. The effect of this

provision is also discussed in connection with the discussion of section 7."

H.R. Rep. No. 510, 80th Cong., 1st Sess. 55 (1947), *reprinted in* 1 Legislative History, at 505, 559. The Board can find no solace in the above report. Indeed, the committee report reiterates that the *Board* must act on a preponderance of evidence and suggests that no substantive change was made from the earlier House draft which included the specific "weight of the evidence" language.

Despite the language in the committee report, the Board relies in particular on the colloquy in the Senate between Senator Pepper, a pro-labor opponent of the bill, and Senator Taft, one of the bill's architects, on whether to adopt the conference committee report. Senator Pepper expressed his fear that the new section, by placing the burden on the General Counsel, would emasculate the Act's protection against unlawful discharges. Senator Taft then attempted to placate him:

> "Mr. PEPPER. Mr. President, turning to page 34 of the conference committee print, the conference has added the following language to the Senate bill.... [quoted above].
>
> That looks like a very simple and innocent provision. It may seem on its face to be a very proper provision, for it appears only to give the employer the right to discharge a worker for good reason. But this is what the provision does: Under the present law a worker may be discharged by his employer for cause, but the Board may go into the real reasons for the discharge, and if the Board finds that although cause was given as the excuse, the real reason was the fact that the worker was trying to organize a union or trying to join a union, the Board may set aside the act of the employer and require the reinstatement of the worker upon that evidence. But this language allows a worker to be discharged because of union activities, although that may be only a concurrent cause of discharge....
>
> Mr. TAFT. I think the Senator is completely mistaken. That is not all the effect of this language. It merely states the present rule. If a man is discharged for cause, he cannot be reinstated. If he is discharged for

union activity, he must be reinstated. In every case it is a question of fact for the Board to determine.

The House language provided that the burden of proof should be on the employee to show that he was not discharged for cause. The Senate conferees took the position that the question was whether he was discharged for cause, and that the burden of proving that cause should be on the employer, because the information is in his hands. So we did not accept the House provision. All this language does is simply to say exactly what the present rule is. If the Board finds that the man was discharged for cause, that is one possible outcome. If it finds that he was discharged for union activity, that is the other outcome. The Board must determine the facts in every case. For years it has had to determine in every case whether a man was discharged for cause or for union activity. In my opinion this language in no way changes the existing provisions of law, after the modification which we forced in the House provision.

Mr. PEPPER. Let me comment on what the able Senator from Ohio has said. If it were not intended to change the existing law, why was anything placed in the conference report on the subject?

Mr. TAFT. Let me say why. When we have a conference with the House and the House yields on all the major points, if the House conferees want certain language in, and the language does not do any more than state the existing law, it is a little hard to refuse to put in it. For the purpose of the RECORD, I am glad to make that statement, because there is no intention whatever to change the existing law on this particular question....

Mr. TAFT. Mr. President, will the Senator yield?

Mr. PEPPER. I yield.

Mr. TAFT. Of course, the Senator understands that that part of the House language was taken out.

Mr. PEPPER. Yes. However, I wish to quote from the conference reort, and I hope Senators will attend what I am about to quote. I suggest that the result of the conference report is to leave the interpretation of the language exactly as the House intended it. Let us see if that is correct. I read from page 55 of the conference report.... [quoted above].

That shows that the Senate conferees agreed to the elimination of the words 'weight of evidence,' because they do not use those words which are necessary to accomplish the effect which the House sought to achieve. They say that under the rules of the Board itself the Board had to find by a preponderance of the evidence and therefore there was not any need to put in the words of the House; but they do not disaffirm the purpose of the House, which the Senator from Ohio has acknowledged this afternoon. . . .

Again, Mr. President, I remind the Senate that that is only one single provision of the bill, although many of them are iniquitous. It is a cumulative affair. Everywhere we turn there is a dagger or a nail or a spike to be stuck into the body of labor to make it less effective in the future than it has been in the past.

Mr. TAFT. Mr. President, will the Senator yield?

Mr. PEPPER. I yield to the Senator from Ohio.

Mr. TAFT. The conference report does not quite say what the Senator from Florida suggests. The original House provision was that no order of the Board could require the reinstatement of any individual or employee who had been suspended or discharged, unless the weight of the evidence showed that such individual was not suspended or discharged for cause. In other words, it was turned around so as to put the entire burden on the employee to show he was not discharged for cause. Under provision of the conference report, the employer has to make the proof. That is the present rule and the present practice of the Board. The Board will have to determine—and it always has—whether the discharge was for cause or for union activity, and the preponderance of the evidence will determine that question. The mere fact that there may be a little cause or real reason would not in any way lead the Board to refuse to give the employee reinstatement and back pay."

93 Cong. Rec. 6677-78 (1947), *reprinted in* 2 Legislative History, at 1565, 1593-95.

Although the debates are by no means conclusive, no clear intent to shift the ultimate burden of persuasion is manifest. Senator Taft's comment that "the employer has to make the proof" does not at all suggest that the burden

of persuasion shifts; if anything, it may be understood to discuss something more akin to a burden of production. That reading is plausible in view of the Senator's next statement, "[t]he Board will have to determine—and it always has—whether the discharge was for cause or for union activity, and the preponderance of the evidence will determine that question." *Id.* at 6678, *reprinted in* 2 Legislative History, at 1565, 1595. Under Senator Taft's view, after the General Counsel's prima facie showing of unlawful motivation and the employer's countervailing demonstration of legitimate motive, the Board must determine the *real* reason by a preponderance of the evidence. This is exactly the reading which we impute to the Act.[12] Thus, the legislative history does not so undermine the

---

[12] The statutory language therefore makes the Board's analogy to the Supreme Court's decision in *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), unconvincing. In attempting to distinguish legitimate discharges from those tarnished by unconstitutional motive, the Court enunciated a burden shifting approach similar to that later adopted by the Board: "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the [school] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the [school] Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.* at 287. However, in *Mount Healthy*, the Court was not faced with any restriction comparable to § 10(c) of the NLRA, and therefore was free to allocate the burden of proof as it saw fit. *See Behring*, *supra*, 675 F.2d at 88. There may well be additional reasons for distinguishing the burden placed on an employee to prove unconstitutional motivation for his or her discharge from that placed on the Board in the §§ 8(a)(3) and 8(a)(1) contexts *See also Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 n.8 (1981) (In Title VII context, the Court emphasized that shifting the burden of production would "sharpen the inquiry into the elusive factual question of intentional discrimination," but that shifting the burden of persuasion would put the onus on the defendant to prove itself innocent).

plain language of § 10(c) as to allow the Board to shift the burden of persuasion to the employer.[13]

The facts of this case clearly illustrate what we regard as the critical distinction between placing the burden of production upon the employer as opposed to the burden of persuasion. The unlawful motive in this case stemmed from the protected leafleting activity. In response to both leaflets, the Center took disciplinary action, suspending Benin and issuing a warning letter to Vargas. That discipline unquestionably violated § 8(a)(1) of the Act. But the Center's subsequent decision further to discipline the two employees came only after the picketing incident. To claim that the leafleting was still clearly the "but for" cause of the added discipline flies in the face of common sense. The leafleting may have contributed in part to the discipline; indeed the Center's letters to the employees notifying them of the discipline referred to both the leafleting and picketing. As the Board maintains, the Center might not have discharged Benin solely for the picketing incident, especially since Vargas was only suspended for participating equally in the same activity. Yet these considerations do not suggest that the Center would have disciplined the employees a second time entirely because of conduct for which they had already

---

[13] Moreover, the Board has taken the legislative history of the 1947 Act completely out of its proper context. As Senator Pepper had remarked, the Taft-Hartley Act sought to limit, not expand, the protections that had been afforded employees in the Wagner Act. *See, e.g.*, H.R. Rep. No. 245, *supra*, at 4-5, *reprinted in* 1 Legislative History at 242, 295-96. It would be anomolous to suggest that the 1947 Act afforded employees greater protection from unjust discharge than had the Wagner Act. In fact, the Supreme Court had rejected a constitutional challenge to the Wagner Act in part by construing its provisions to guarantee employers the right to discharge employees for any reason at all save conduct protected under the Act: "The Act does not interfere with the normal exercise of the right of the employer to select its employees or discharge them.... [T]he Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1936). The Court sought to ensure that union membership would not shield an employee from discharge as long as the *real* reason for the discharge was unconnected to union activities.

been disciplined. The Board's test, however, allows the Board to reach the contrary result without analyzing the circumstances in full. The burden shifting approach of the Board might permit the two employees in question to escape any discipline for the picketing, even though other employees in the same situation may well have been lawfully disciplined.[14]

With competing motives present, the Board must decide which was the *real* or "but for" cause of the discipline. Before it concludes that an unfair labor practice was committed, it must be satisfied that the General Counsel has proven by a preponderance of the evidence that the unlawful motive engendered the disciplinary measure.[15] We are not persuaded that, had the Board imposed a burden of production as opposed to a burden of persuasion on the employer, it would have arrived at the same result in this case. *See NLRB* v. *Mount Desert Island Hospital*, *supra*, at 14-17. We make no judgment now on the lawfulness of the picketing should that determination become necessary on remand.

Accordingly, while we are prepared to enforce the Board's order in the respects indicated above, we remand the case to the Board for further proceedings pursuant to

[14] It seems evident that the Center would have disciplined the employees to some extent for taking part in the picketing, regardless of the previous leafleting. Although the Board will be unable to separate lawful from unlawful discipline in most mixed motive cases, it should allow some subsequent discipline to stand against the employees if the picketing is later found to be unprotected, even if the discharge of Benin and the suspension of Vargas are countermanded. Otherwise, the prior protected activities would have shielded the employees from lawful, appropriate discipline.

[15] Sound policy reasons buttress our reading of § 10(c) of the Act. By forcing the Board to articulate why a preponderance of the evidence shows that the unlawful motive caused the discipline, the Board is likely to analyze the components of a discriminatory discharge more clearly and "not retreat behind the opaque language of 'burden of proof.'" *NLRB* v. *Transportation Management Corp.*, *supra*, 674 F.2d at 134 (Breyer, J., concurring). Thus, one of the purposes behind enactment of §§ 10(c) and 10(e) of the Act is reached—encouraging reasoned elaboration from the Board, and simplifying the task of the reviewing court.

this opinion. We retain jurisdiction pending the Board's further order, any review of which shall be heard by the panel that heard the instant application.

Remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 82-4137

NATIONAL LABOR RELATIONS BOARD, PETITIONER

AND

LEIGH BENIN, FAUSTINO VARGAS, AND LASZLO BERKOVITS, INTERVENORS,

v.

NEW YORK UNIVERSITY MEDICAL CENTER, RESPONDENT

Mar. 7, 1983

JUDGMENT

Before: TIMBERS, KEARSE, AND PIERCE, Circuit Judges.

THIS CAUSE came on to be heard upon the application for enforcement of an order of the National Labor Relations Board dated May 12, 1982, against Respondent, New York University Medical Center, New York, New York, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on November 4, 1982, and has considered the briefs and transcript of record filed in this cause. On January 21, 1983, the Court being fully advised in the premises handed down its opinion remanding the case to the Board for further proceedings. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the case is remanded to the Board for further proceedings pursuant to the Court's opinion.

/s/ WM. H. TIMBERS
Judge, United States Court of Appeals for the Second Circuit

/s/ AMALYA L. KEARSE ERP
Judge, United States Court of Appeals for the Second Circuit

/s/ LAWRENCE W. PIERCE
Judge, United States Court of Appeals for the Second Circuit

APPENDIX C

261 NLRB No. 118

FJZ
D—8802
New York, NY

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

NEW YORK UNIVERSITY MEDICAL CENTER
and
FAUSTINO VARGAS, an Individual
Case 2—CA—16796
LEIGH BENIN, an Individual
Case 2—CA—16824
LASZLO BERKOVITS, an Individual
Case 2—CA—16833

DECISION AND ORDER

On October 31, 1980, Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding.[1] Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order,[2] as modified herein.

---

[1] The Decision was corrected by an erratum issued by the Administrative Law Judge dated November 28, 1980.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, New York University Medical Center, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs accordingly:

"(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C.

May 12, 1982

/s/ _____

JOHN H. FANNING,
Member

/s/ _____

HOWARD JENKINS, JR.,
Member

/s/ _____

DON A. ZIMMERMAN,
Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discourage employees from distributing leaflets by unlawfully issuing disciplinary warnings to or suspending or discharging employees for engaging in activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL rescind the disciplinary warnings issued to Faustino Vargas and Leigh Benin on September 28, 1979, and to Laszlo Berkovits on October 11, 1979, and WE WILL expunge any references to these warnings from their personnel files.

WE WILL reimburse Faustino Vargas and Leigh Benin for the pay they lost during their periods of suspension, with interest.

WE WILL offer Leigh Benin immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of his discharge, with interest.

NEW YORK UNIVERSITY MEDICAL CENTER
(Employer)

Dated____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Jacob K. Javits Federal Building, Room 3614, 26 Federal Plaza, New York, New York 10278, Telephone 212—264-0360.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
NEW YORK, NEW YORK

Case Nos. 2-CA-16796
2-CA-16824
2-CA-16833

NEW YORK UNIVERSITY MEDICAL CENTER

AND

FAUSTINO VARGAS, AN INDIVIDUAL

AND

LEIGH BENIN, AN INDIVIDUAL

and

LASZLO BERKOVITS, AN INDIVIDUAL

JAMES WASSERMAN, ESQ.
New York, New York, for the
General Counsel.
DAVID M. ROSOFF, ESQ.
New York, New York, for
Leigh Benin.
RICHARD A. SEMERARO, ESQ.
New York, New York, for the
Respondent.

[Oct. 31, 1980]

DECISION

Statement of the Case

D. BARRY MORRIS, Administrative Law Judge: This case was heard at New York, New York on July 14 and 15, 1980. Charges were filed in October 1979 and a consolidated complaint was issued on April 16, 1980 alleging that New York University Medical Center ("Respondent") violated Section 8(a)(1) of the National Labor Relations Act, as

amended (the "Act"). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. Briefs were filed by the General Counsel, Respondent and Leigh Benin.

Upon the entire record of the case, including my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent is an administrative division of New York University, a private, non-profit institution of higher education located in New York, New York. Respondent is engaged in providing health care and related services at its medical facility located in New York City. During the twelve months preceding the issuance of the complaint, Respondent's gross revenue was in excess of $1,000,000 and it purchased and received at its New York City facility goods and supplies valued in excess of $50,000 directly from points outside the State of New York. Respondent admits, and I so find, that it is engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act and that it is a health care institution within the meaning of Section 2(14) of the Act.

II. The Labor Organization Involved

District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO ("District 1199") is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Issues*

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by issuing disciplinary warnings to Faustino Vargas ("Vargas"), Leigh Benin ("Benin") and Laszlow Berkovits ("Berkovits"), by suspending Benin and Vargas and by discharging Benin. Respondent denied the

allegations claiming that Benin, Vargas and Berkovits were issued disciplinary warnings for distributing leaflets which were unprotected under the Act, that Benin was suspended for additional unprotected leafleting and that Benin was discharged and Vargas was suspended because they picketed the private residence of one of Respondent's employees. The issues thus are:

(1) Was the distribution of the leaflets protected activity under the Act;

(2) Were Benin's discharge and Vargas' suspension motivated by protected activity; and

(3) Should the Board defer to the award of an arbitrator and dismiss the complaint.

B. *The Facts*

Benin, Vargas and Berkovits worked as technicians at Respondent's facility. Benin and Vargas were District 1199 delegates and all three were members of the Committee Against Racism ("CAR"), a national organization.

During September 1979 elections were held for delegates to the bi-annual national convention of the National Union of Hospital and Health Care Employees ("NUHHCE"). The purpose of the convention was to set policy and to elect the officers of the national union. District 1199 was entitled to send approximately 40 delegates to the convention.

Members of District 1199 who also belonged to CAR or the Progressive Labor Party decided to designate a slate of candidates to run as delegates to this convention. Benin, Vargas and ten others qualified as candidates and were designated as "Slate 2" by District 1199's election board. This group ran against "Slate 1", which included the incumbent officers of District 1199. The balloting for convention delegates took place on September 18 and September 25.[1] The returns from the balloting of September 18 showed that Slate 2 had received 60 percent of the vote.

On September 21, 24 and 25 Benin distributed two leaflets, G.C. Exhibits 4 and 5. He was joined in the distribu-

[1] Unless otherwise specified dates refer to 1979.

tion by Vargas on September 24. G.C. Exhibit 4 states, in pertinent part:

> Vote Slate 2, the Anti-Racist Slate. We urge 1199 Hospital Div. Workers to VOTE SLATE 2 on Tuesday, September 25th.... Join the Committee Against Racism.

G.C. Exhibit 5 states, in pertinent part:

> Join the Committee Against Racism. Vote Slate 2, The Anti-Racist Slate.... The NYU bosses have turned their security guards into a fascist gestapo illegally searching workers and firing them.

On September 28, Respondent advised Benin and Vargas in writing that their activities in distributing G.C. Exhibit 5 "constitutes grounds for disciplinary action." The memorandum further stated that "any repetition of this or similar misconduct will result in appropriate disciplinary action, including suspension or discharge."

During the period October 5 through 9, Benin, Vargas and Berkovits were involved in the preparation and distribution of another leaflet, G.C. Exhibit 8. This leaflet discussed the outcome of the September 18 election and also stated that Benin and Vargas received written warnings for distributing G.C. Exhibit 5. In addition, among other accusations, the leaflet stated "we reaffirm our charge that the N.Y.U. management is using the security guards for fascist gestapo tactics to intimidate black and Spanish workers." On October 5, because of his participation in the distribution of G.C. Exhibit 8, Benin was supended from work without pay.

On October 8, Benin, Vargas and several others picketed in front of the personal residence of Keith Safian, an assistant administrator of Resondent. Benin carried a sign which stated that Safian was guilty of unfair labor practices and Vargas carried G.C. Exhibit 13, which announced a CAR rally to be held at Harper's Ferry on October 27. Benin and Vargas both testified that at no time were they on Safian's property.[2]

[2] Their testimony was not contradicted. Accordingly, I credit their testimony and find that during the picketing Benin and Vargas were not on Safian's property.

On October 11 Respondent discharged Benin and suspended Vargas. On the same day Respondent sent a written warning to Berkovits for distributing G.C. Exhibit 8.

C. *Discussion and Conclusions*

1. Distribution of Leaflets

Respondent contends that, because of the language contained in the leaflets their distribution is not activity protected by the Act. For the reasons stated below, I believe that the language is not such as to lose protection under the Act. Accordingly, any disciplinary action taken by Respondent because of the distribution of these leaflets violates Section 8(a)(1) of the Act.

Employee literature, otherwise protected, loses this status only in limited circumstances, such as if the literature contains attacks on an employer's products or services (*NLRB* v. *Local 1229, IBEW (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953)); material so disruptive as to threaten plant discipline (*Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972)); and malicious falsehoods (*Great Lakes Steel, Division of National Steel Corp.*, 236 NLRB 1033 (1978)).

The leaflets do not attack or disparage the services that Respondent delivers, *viz.*, health care services. In addition, the leaflets do not urge or incite, through obscenities or otherwise, employees to take any action which would be disruptive of Respondent's right to enjoy an orderly work place.

Respondent contends that the leaflets contain statements which constitute "malicious falsehoods", such as "the NYU bosses have turned their security guards into a fascist gestapo illegally searching workers and firing them" (G.C. Exhibit 5) and "we reaffirm our charge that the N.Y.U. management is using the security guards for fascist gestapo tactics to intimidate black and Spanish workers" (G.C. Exhibit 8). The question to be answered is whether the leaflets contain statements which Benin, Vargas and Berkovits knew were false or were published with reckless disregard for the truth. See *New York Times Co.* v. *Sullivan*, 376

U.S. 254, 280 (1964); *Linn* v. *United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966).[3]

Benin and Vargas testified that they received reports that Respondent's guards were searching black and hispanic employees. These reports served as the basis for the statements in the leaflets concerning the practices of Respondent's security guards. Indeed, Benin and Vargas gave the names of employees who made these reports.

I am not required to determine whether in fact illegal searches were carried out. Instead, I must determine whether the distributors of the leaflets knew that the statements were false or published them with reckless disregard for whether they were false or not. As outlined above, based on the record, I find that Benin, Vargas and Berkovits did not know that the statements were false nor were they published with reckless disregard for whether the statements were false or not. While I do not condone the use of terms such as "fascist gestapo" in the present circumstances, the Supreme Court has stated "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." *Linn* v. *United Plant Guard Workers of America, Local 114, supra*, 383 U.S. at 63.[4]

Accordingly, I find that the distribution of the leaflets was an activity protected by the Act and therefore the disciplinary warnings to Vargas, Benin and Berkovits and the suspension of Benin were violations of Section 8(a)(1) of the Act.

2. Discharge of Benin and Suspension of Vargas

Respondent contends that Benin was discharged and Vargas was suspended because they picketed the personal

---

[3] In *Linn* the Supreme Court explicitly adopted the *New York Times* standards in NLRB proceedings. *National Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264 (1974).

[4] Indeed, some of the very language used in the leaflets has been held to be protected. Thus, the use of the term "fascist" was protected in *Cafeteria Employees Local 302* v. *Angelos*, 320 U.S. 293, 295 (1943) and the use of the term "racist" was permitted in *Owners Maintenance Corp.*, 232 NLRB 100, 102 (1977), enfd. 581 F.2d 44 (2d Cir. 1978).

resident [*sic*] of Keith Safian, an assistant administrator of Respondent. Respondent further argues that such picketing is unprotected. It is unnecessary for me to reach the question of whether such picketing is protected[5] for I find that the distribution of the leaflets was a motivating factor in Benin's discharge and Vargas' suspension.

The Board has recently restated the test to be applied in so-called "mixed motive" cases. *Wright Line, Inc.*, 251 NLRB No. 150 (1980). The Board requires that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a *motivating factor* in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the "the same action would have taken place even in the absence of the protected conduct."

I find that the General Counsel has made a *prima facie* showing that the leafleting was a motivating factor in Benin's discharge and Vargas' suspension. Thus, the telegram discharging Benin states, in pertinent part, "your recent activity in distributing leaflets containing inflammatory and baseless charges which incited employees against the Medical Center and fellow employees and disparaged the good name and reputation of the Medical Center, was also considered in reaching the decision to discharge you." Similarly, the memorandum to Vargas dated October 11, 1979, suspending him, stated in pertinent part, "your recent activity in distributing leaflets containing inflammatory and baseless charges which incited employees and disparaged the good name and reputation of the Medical Center was also considered in reaching the decision to suspend you."

The conclusion that the distribution of the leaflets was a motivating factor in the subsequent discharge of Benin and suspension of Vargas is corroborated by testimony at a state unemployment compensation hearing in which Safian stated:

---

[5] I have previously found that Benin and Vargas were not on Safian's property during the picketing.

> Mr. Benin, on the other hand, received a warning, was observed again handing out objectionable material, then got a five day suspension, and then, because of picketing subsequent to that, after having the progressive disciplinary steps of warning and suspension, we felt that he should be terminated.

Respondent has not demonstrated that Benin would have been discharged and Vargas suspended were only the picketing involved. On the contrary, Safian's above-quoted testimony indicates that Respondent believed that the three steps of warning, suspension and termination had to follow in proper sequence to justify disciplinary action. Indeed, Vargas was not discharged for the picketing but was merely suspended, presumably because prior to the picketing he had been subject to only the first step of the disciplinary process.

Accordingly, I find that the distribution of the leaflets was a motivating factor in Benin's discharge and Vargas' suspension. Such discharge and suspension violated Section 8(a)(1) of the Act.

3. Arbitration Award

Respondent has moved that I defer to the award of Arbitrator Herbert L. Marx, Jr., dated May 20, 1980. For the reasons outlined below, I deny the motion to defer.

The Arbitrator determined that the warning letter, suspension and discharge of Benin were all for just cause. There was no award with respect to Vargas and Berkovits.

In discussing the leaflets the Arbitrator refers specifically to the statement "the NYU bosses have turned their security guards into a fascist gestapo illegally searching workers and firing them." The Arbitrator determined that Respondent was in its rights to discipline Benin because of such statement, declaring "there is no need for the Medical Center to stand by defenseless in the face of such scurrilous accusations. . . ." Similarly, with respect to Benin's suspension, the Arbitrator found that Respondent was justified in suspending Benin because of language in the leaflets such as "fascist gestapo." Concerning Benin's discharge, it appears that the Arbitrator recognized that the leafletting

and picketing were interrelated. Thus, the Arbitrator stated "the Medical Center had sufficient cause to warn, suspend and discharge Leigh Benin for his share of responsibility in the events described."

As stated earlier, I have found the very language referred to by the Arbitrator to be protected under the Act. Inasmuch as the Arbitrator found such language to be unprotected, his decision is clearly repugnant to the purposes and policies of the Act. See *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082 (1955); *Owners Maintenance Corp.*, *supra*, 232 NLRB 100. In addition, neither Vargas nor Berkovits agreed to be bound by the results of the arbitration. Accordingly, deferral with respect to them is inappropriate. See *Spielberg Manufacturing Co.*, *supra*.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

2. District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing warning letters, suspending and discharging employees for activities protected by the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily suspended Faustino Vargas and Leigh Benin, I find it necessary to order that Respondent make them whole for the periods of their suspension.

Respondent having discharged Leigh Benin in violation of the Act, I find it necessary to order Respondent to offer him full reinstatement to his former position, or if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any losses of earnings that he may have suffered from the time of his termination to the date of Respondent's offer of reinstatement.

Backpay shall be computed in accordance with the formula approved in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[6]

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[7]

Order

Respondent, New York University Medical Center, its officers, agents, successors and assigns, shall.

1. Cease and desist from:

(a) Discouraging employees from distributing leaflets by unlawfully issuing disciplinary warnings, suspending or discharging employees for activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Leigh Benin immediate and full reinstatement to his former position, or if such posi-

---

[6] See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717–721 (1962).

[7] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

tion no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any losses of earnings in the manner set forth in the section above entitled "The Remedy."

(b) Reimburse Faustino Vargas and Leigh Benin for the pay they lost during their periods of suspension, and make them whole for any loss of earnings in the manner set forth herein in "The Remedy."

(c) Rescind the disciplinary warnings issued to Faustino Vargas, Leigh Benin and Laszlo Berkovits referred to in this Decision, and expunge any reference to these warnings from their personnel files.

(d) Post at its facility in New York, New York copies of the attached notice marked "Appendix."[8] Copies of the notice on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 2, in writing, within 20 days of the date of this Order, what steps the Respondent has taken to comply herewith.

Dated:

/s/ _____

D. BARRY MORRIS
Administrative Law Judge

---

[8] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL AT WHICH ALL SIDES HAD AN OPPORTUNITY TO GIVE EVIDENCE, AN ADMINISTRATIVE LAW JUDGE OF THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT, AND HAS ORDERED US TO POST THIS NOTICE.

WE WILL NOT discourage employees from distributing leaflets by unlawfully issuing disciplinary warnings, or suspending or discharging employees for activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL rescind the disciplinary warnings issued to Faustino Vargas and Leigh Benin on September 28, 1979, and to Laszlo Berkovits on October 11, 1979, and will expunge any references to these warnings in their personnel files.

WE WILL reimburse Faustino Vargas and Leigh Benin for the pay they lost during their periods of suspension and make them whole for any loss of earnings.

WE WILL offer full and immediate reinstatement to Leigh Benin to his former position, or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole for any loss of earnings he may have suffered by reason of his discharge.

NEW YORK UNIVERSITY MEDICAL CENTER
(Employer)

Dated:_____ By: _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office,

National Labor Relations Board
Region 2, Room 3614
26 Federal Plaza
New York, New York 10278 (212) 264-0360

(THIS PAGE INTENTIONALLY LEFT BLANK)

No. 82-1705

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NEW YORK UNIVERSITY MEDICAL CENTER, ET AL.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

S. ANDREW SCHAFFER
RICHARD A. SEMERARO
Attorneys for Respondent
70 Washington Square South
New York, NY 10012
(212) 598-2691

QUESTION PRESENTED

Whether there remains any issue in this case which should be considered by the National Labor Relations Board and the Court of Appeals below prior to consideration by this Court.

TABLE OF CONTENTS

	Page
Statement	1
Reasons for denying the petition	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

NLRB. v. Transportation Management Corp., ____ U.S. ____, (No. 82-168 decided June 15, 1983).....5, 6

Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083, enforced, 662 F.2d 899, cert. denied, 455 U.S. 989 (1982).....3, 4, 5, 6

Statute:

National Labor Relations Act, 29 U.S.C. 151 et seq.:

Section 7, 29 U.S.C. 157.....4

Section 8(a)(1), 29 U.S.C. 158(a)(1).....2, 4

Section 8(a)(3), 29 U.S.C. 158(a)(3).....3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-1705

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NEW YORK UNIVERSITY MEDICAL CENTER, ET AL.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATEMENT

Respondent New York University Medical Center provides health care services in New York, New York (App. C, 33a).*

On September 21, 24 and 25, 1979, employee Benin and, on one occasion, employee Vargas distributed leaflets to employees. One of the leaflets they distributed contained accusations that the respondent used its security guards as a "fascist gestapo" to conduct searchs of workers (App. A, 3a-4a; App. C, 34a-35a). On September 28, 1979, respondent issued written disciplinary warnings to Benin and Vargas for their distribution of the leaflets.

---

* Citations to appendices refer to the appendices contained in the Board's petition.

In early October, Benin, Vargas and employee Laszlo Berkovits took part in the preparation and distribution of another leaflet, which renewed the allegation that "the N.Y.U. management is using the security guards for fascist gestapo tactics" (App. C, 35a). On October 5, 1979, Benin was notified by respondent that he was being suspended from work without pay because of his participation in the distribution of this leaflet (id. at 35a).

On October 8, 1979, Benin, Vargas and several other individuals picketed the home of respondent's assistant administrator Safian to protest Benin's suspension (App. C, 35a). At least one of the picketers intruded upon the administrator's property, leaving two signs in the mailbox. One read, "Safian, You Fascist We'll Burn You into Ashes." The other read "Safian Uses Fascist Tactics Against Workers" (App. A, 5a). On October 11, 1979, respondent discharged Benin and suspended Vargas "for threatening a Medical Center Administrator and his family and engaging in intimidating behavior outside his house on October 8, 1979" (App. A, 5a). Respondent also issued a written warning to employee Berkovits on October 11, 1979 for his involvement in the distribution of the most recent leaflet (App. C, 36a). The Board's General Counsel subsequently filed a complaint alleging that respondent's disciplinary measures violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1).

The administrative law judge ("ALJ") found that respondent had violated Section 8(a)(1) of the Act by issuing disciplinary

warnings to Benin, Vargas and Berkovits, by suspending Benin and Vargas, and by discharging Benin, because they engaged in the protected activity of distributing leaflets concerning an intra-union election campaign (App. C, 32a-44a). The ALJ recommended that Benin be reinstated with back pay, that Benin and Vargas be reimbursed for wages lost during their periods of suspension, and that the disciplinary warnings issued to Benin, Vargas and Berkovits be expunged from respondent's personnel files (id at 40a-44a).

In reaching his conclusion that the discharge of Benin and suspension of Vargas were unlawful, the ALJ expressly relied (App. C, 38a-39a) on the Board's decision in Wright Line, a Division of Wright Lines, Inc., 251 N.L.R.B. 1083 (1980), enforced 692 F.2d 899 (CA1 1981), cert. denied, 455 U.S. 989 (1982). In Wright Line the Board explained that, in determining whether an employer's action violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), it would first require the General Counsel to show that the employee's protected activities were a "motivating factor" in the employer's decision to take adverse action against the employee. If the General Counsel made this showing, the Board ruled that the employer could avoid an unfair labor practice finding if it proved, by a preponderance of the evidence, that it would have taken the adverse action even if the employee had not engaged in protected activities. 251 NLRB at 1089.

The ALJ found that the General Counsel had sustained his burden of establishing that the employees' protected leafleting

activity was a motivating factor in the discharge of Benin and the suspension of Vargas (App. C, 38a). The ALJ further found that respondent had failed to rebut the General Counsel's showing by establishing that it would have discharged Benin and suspended Vargas if they had engaged only in picketing activity (id. at 39a). The ALJ found it unnecessary to reach the issue of whether the employees' picketing activity was protected under the Act (id. at 38a).

The Board affirmed the decision of the ALJ and adopted his recommended order (App. C, 28a-31a).

The Second Circuit sustained the Board's findings that the employees' leafleting activity was protected by Section 7 of the Act, 29 U.S.C. 157, and that respondent's suspension of Benin and issuance of warning letters to Benin, Vargas and Berkovits for the distribution of the leaflets violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1) (App. A, 1a-26a). However, the court remanded the case to the Board for reconsideration of the conclusion that respondent's discharge of Benin and suspension of Vargas violated Section 8(a)(1) of the Act (App. A, 13a-26a).

While the Second Circuit remanded the case to the Board because it disagreed with the Board's Wright Line allocation of the burden of proof, it did not find that the Board's decision (that Benin would not have been discharged and Vargas would not have been suspended except for their protected activity in distributi

leaflets) was supported by substantial evidence on the record considered as a whole. To the contrary, it stated that the Board's decision on this point "flies in the face of common sense" (App. A, 24a).

The court noted that the discharge and suspension came only after the picketing incident (not alleged to be protected activity by the General Counsel) and stated that the General Counsel's evidence did not "suggest that the Center would have disciplined the employees a second time entirely because of conduct for which they had already been disciplined" (App. A, 24a, 25a).

Finally, and most clearly, the Second Circuit stated in footnote 14:

> "It seems evident that the Center would have disciplined the employees to some extent for taking part in the picketing, regardless of the previous leafleting" (App. A, 25a).

REASONS FOR DENYING THE PETITION

In National Labor Relations Board v. Transportation Management Corp., _____ U.S. _____, (No. 82-168 decided June 15, 1983), the Court upheld the Board's Wright Line* allocation of the burden of proof in dual-motive cases, and then found that the Board's

---

* Wright Line, 251 NLRB 1083 (1980), enforced, 662 F.2d 899 (CA1 1981), cert. denied 455 U.S. 989 (1982).

decision (that the employee involved would not have been discharged in the absence of his union activity) was supported by substantial evidence on the record considered as a whole.

The Second Circuit remanded the instant case because it disagreed with the Board's Wright Line allocation of the burden of proof. In view of the Supreme Court's ruling in Transportation Management, supra, the Board may use the Wright Line allocation and that is no longer an issue in this case. The Second Circuit, however, did not rule on the issue of whether the Board's decision concerning Benin's discharge and Vargas' suspension was supported by substantial evidence on the record considered as a whole. Instead it indicated clearly that it did not believe that it was. It stated that the Board's decision "flies in the face of common sense" (App. A, 24a). It rejected the Board's reasoning that the Medical Center took the opportunity of the subsequent unprotected picketing to discipline Benin and Vargas a second time for their protected activity in distributing leaflets (App. A, 24a, 25a). It concluded that "the Center would have disciplined the employees to some extent for taking part in the picketing, regardless of the previous leafleting" (App. A, 25a).

If the petition is denied, this case would be remanded to the Board for further proceedings. In view of the Court's decision in Transportation Management, supra, the Board would not need to change its allocation of the burden of proof. It might decide, however, to accept the Second Circuit's opinion on the unpersuasive

nature of the evidence supporting its decision. In this respect, it should be noted that the Board used its short form opinion in this case, adopting the findings and conclusions of the Administrative Law Judge, and did not give the appellate court the benefit of its reasoning (App. C, 28a, 29a). If the Board reissues its order and seeks enforcement, the Court of Appeals will then have the opportunity to consider whether the decision is supported by substantial evidence on the record considered as a whole. This would be the most orderly and appropriate way for the case to be handled. If this procedure is followed, this Court need not and should not consider this case at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

S. ANDREW SCHAFFER
RICHARD A. SEMERARO
Attorneys for Respondent

July 13, 1983

Office - Supreme Court, U.S.
FILED
JUL 22 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1705

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NEW YORK UNIVERSITY MEDICAL CENTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1705

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NEW YORK UNIVERSITY MEDICAL CENTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Respondent New York University Medical Center urges that the petition for a writ of certiorari in this case should be denied, so that the Board may reconsider the case. That suggestion should be rejected.

As respondent acknowledges (Response to Petition at 6), the court of appeals concluded that this case should be remanded to the Board because it disagreed with the Board's allocation of the burden of proof in dual motive cases, set out in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). This Court subsequently upheld the Board's *Wright Line* allocation in *NLRB* v. *Transportation Management Corp.*, No. 82-168 (June 15, 1983). The court of appeals should have an opportunity to reevaluate whether a remand to the Board is still appropriate in light of *Transportation Management*.

It is therefore respectfully submitted that the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand to the court of appeals for further consideration in light of the Court's decision in *NLRB* v. *Transportation Management Corp.*[1]

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board

JULY 1983

---

[1]The Court has followed this procedure in other cases in which we filed protective petitions pending the Court's decision in *NLRB* v. *Transportation Management Corp.* See *NLRB* v. *Behring International, Inc.*, No. 82-438 (June 20, 1983); *NLRB* v. *Heartland Food Warehouse*, No. 82-736 (June 20, 1983); *NLRB* v. *Blackstone Co., Inc.*, No. 82-1105 (June 20, 1983).